

An auctioneer acting on behalf of an unknown or undisclosed principal is responsible for Retailers' Occupation Tax on the gross receipts from the sale. However, if the auctioneer is acting on behalf of a known or disclosed principal, the sale of tangible personal property is taxable to the principal and not the auctioneer if the principal is a retailer of the tangible personal property being sold at the auction. See 86 Ill. Adm. Code 130.1915. (This is a GIL).

October 30, 2000

Dear Mr. Xxxxx:

This letter is in response to your letter dated August 24, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

On behalf of our client, we are respectfully requesting a ruling regarding the proper sales and use tax treatment for the following types of transactions. Our client is unique in the manner in which they conduct business over the Internet. Accordingly, we are requesting guidance and/or Illinois's position in the treatment of these types of transactions.

**FACTS:**

Company X sells goods and services via the Internet. Company X does not have a physical presence in Illinois. Company X is commonly understood to be a consumer oriented Internet retailer of new and surplus tangible personal property and travel packages (i.e. cruises, tours, flights, etc). A visitor to Company X's Internet site may make a purchase in one of two manners. The first is an auction site hosted by the company (see 'Auction Site Transactions' discussion below). On this type of site, Company X offers bargains on excess goods and services via the Internet. The other manner in which a visitor may make a purchase is purchasing directly from Company X the product (see 'Surplus Goods Direct' discussion below).

**Company X facilitates Sales on Behalf of Vendors (Auction Site Transactions)**

Company X provides a service whereby it brings vendors and buyers together, via the Internet, in order to facilitate a sales transaction. In a typical sales transaction facilitated by Company X, Company X will list a product for sale on the behalf of a vendor ('Vendor'). Once listed, the product is bid on by several potential buyers, and ultimately purchased by one buyer ('Buyer'). Company X charges the Buyer's credit card once the bidding process is closed. Buyer has the ability to print out invoices for purchases facilitated by Company X on its website. At no time does Company X take title to or

possession of the product being sold by Vendor nor do they perform any services associated with the travel packaged.

In situations where Vendor has sufficient sales/use tax nexus in your state and Company X does not, Company X takes payment from Buyer, including amounts applicable to sales/use tax, and remits the total amount (including sales/use taxes) less commission to Vendor. Vendor then assumes the contractual responsibility to report and remit sales/use tax to Illinois. Vendor also takes responsibility for warranty, packaging and shipping of the product.

#### **Company X Sells Product on Internet (Surplus Goods Direct)**

Customer browses Company X Internet site for product, upon locating a product he desires, the product is included in his shopping cart. Upon finishing his shopping activity, the buyer submits the order to Company X. Company X in turn charges the customer's card for the selling price and shipping charges of the product. Upon completion of verification of funds, Company X submits a purchase order to purchase the product from one of its Vendors, via communication of the order information to the Vendor. The purchase order will include information pertaining to the product purchase, such as make, model, quantity desired, and the ship-to-location of Company X's customer. Vendor will fill the order and ship the product directly to Company X's customer. At no time does Company X take title to or possession of the product being sold by Vendor.

In situations where Vendor has sufficient sales/use tax nexus in your state and Company X does not, Company X takes payment from Buyer, including amounts applicable for sales/use tax. Company X remits to Vendor the invoiced cost of the product plus the collected sales tax (based on the customer's purchase price) to the Vendor. Vendor then assumes the contractual responsibility to report and remit sales tax to the state. Vendor also takes responsibility for warranty, packaging and shipping of the product.

#### **QUESTIONS PRESENTED:**

##### **When Company X facilitates Sales on Behalf of Vendors**

1. Can Company X receive payments for sales/use tax on behalf of Vendors (and remit the collected amounts to the Vendor) where Vendors have the legal and contractual duty, where applicable, to remit such amounts to Illinois?
2. Given that Company X has no physical presence in Illinois, will Company X be subject to a sales/use tax liability for transactions it undertakes on behalf of its Vendors?

##### **When Company X Conducts Sales on Its Own Behalf**

1. Given that Company X has no physical presence in Illinois, will Company X be subject to a sales/use tax liability for transactions it undertakes on its own behalf?

In addition, will transactions facilitated by Company X on behalf of Vendors ever have implications for creating sales/use tax liabilities for Company X when it sells on its own behalf?

Your assistance is important in resolving this issue for our client. If you have any questions or need any additional information, please call me at #####. Thank you in advance for your cooperation extended to our client in this matter.

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we hope you find the following information helpful.

An Illinois retailer is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois retailer is liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by purchasers.

The definition of a "retailer maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 150.201(i), see enclosed. An out-of-State retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See the enclosed copy of 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of its Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The final type of retailer is simply the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax law. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's sales tax laws. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due Process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Id.* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person nor entity must have physical presence in the forum state to satisfy the Commerce Clause.

A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

As you can see from the Department's regulation governing auctioneers and agents, see 86 Ill. Adm. Code 130.1915, enclosed, an auctioneer acting on behalf of an unknown or undisclosed principal is considered to be the owner of the tangible personal property that will be auctioned and is responsible for Retailers' Occupation Tax on the gross receipts from the sale.

However, if the auctioneer is acting on behalf of a known or disclosed principal, the sale of tangible personal property is taxable to the principal and not the auctioneer if the principal is a retailer of the tangible personal property being sold at the auction. If the tangible personal property sold at the auction is not tangible personal property that is customarily sold in business by the disclosed principal, then the sale is not taxable because this transaction is considered an occasional sale by an occasional seller, the disclosed principal. This being the case, the Illinois purchaser incurs no corresponding Use Tax. A disclosed principal is one whose name and address are made known to the purchaser at or before the time of sale and whose name and address appear upon the books and records of the agent.

Please note that even if Retailers' Occupation Tax liability is not incurred because a retail sale occurs outside of Illinois, Illinois purchasers will nonetheless incur a Use Tax liability upon the privilege of using the tangible personal property in Illinois.

Depending upon how you structure your transactions the following discussion regarding drop shipments may be useful to you.

A drop shipment situation is one in which out-of-State purchasers (Purchasers) make purchases for resale from companies (Companies) which are registered with Illinois and have those Companies drop ship the property to Purchasers' customers (Customers located in Illinois. For this discussion, it is assumed that Purchasers are out-of-State companies that are not registered with the State of Illinois and do not have sufficient nexus with Illinois to require them to collect Illinois Use Tax.

As sellers required to collect Illinois tax, Companies must either charge tax or document exemptions when they make deliveries in Illinois. In order to document the fact that their sales to Purchasers are sales for resale, Companies are obligated by Illinois to obtain valid Certificates of Resale from Purchasers. See the enclosed copy of 86 Ill. Adm. Code 130.1405. Certificates of Resale must contain the following information:

1. a statement from the purchaser that items are being purchased for resale;
2. seller's name and address;
3. purchaser's name and address;
4. a description of the items being purchased for resale;
5. purchaser's signature and date of signing;

6. purchaser's registration number with the Illinois Department of Revenue; purchaser's resale number issued by the Illinois Department of Revenue; or, a statement that the purchaser is an out-of-State purchaser who will sell only to purchasers located outside the State of Illinois.

If purchasers have no nexus with Illinois, it is unlikely that Purchasers would be registered with Illinois. If that is the case, and if Purchasers have no contact with Illinois which would require them to be registered as out-of-State Use Tax collectors for Illinois, then Purchasers could obtain resale numbers which would provide them the wherewithal to supply required numbers to Companies in conjunction with Certificates of Resale.

Resale numbers are issued to persons who make no taxable sales in Illinois but who need the wherewithal to provide suppliers with Certificates of Resale when purchasing items that will be resold. So long as Purchasers do not act as Illinois retailers and, so long as they do not fall under the definition of a "retailer maintaining a place of business in this State," their sales to Illinois customers are not subject to Illinois Retailers' Occupation Tax liability and they cannot be required to act as Use Tax collectors. So long as this is true, Purchasers qualify for resale numbers which do not require the filing of tax returns with the Illinois Department of Revenue. See 86 Ill. Adm. Code 130.1415.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Martha P. Mote  
Associate Counsel

MPM:msh  
Enc.